the prosecution did not discharge the onus which lay upon them of proving knowledge.

I repeat the words of the sub-section which are as follows:—

"(iii) Any employer wilfully disregarding the provisions of sub-section (i) shall be deemed to have committed an offence against this Enactment."

Now, I am not sure that I fully understand what this means. It is not a form of words that is usual in statutes. Indeed, I cannot remember having seen it used in any other statute. It might be argued that wilfully to disregard anything is a contradiction in terms and an impossibility. Again it might be argued that what is to be deemed an offence is a process of cognition and not any overt act. These questions, however, do not arise at this stage. They may well arise when the second charge comes before the Magistrate, if it ever does, and by reason of the first charge having been adjudicated upon his answer to the question may well be influenced by the view he takes of the metaphysical question of the possibility of simultaneous processes of cognition. For the purposes of the present case, it will be sufficient to assume that what is an offence is any overt act which is wilfully committed and which amounts to a contravention of the provisions of sub-section (i). I do not see that the mental element can be any further excluded than that for to say that a thing is done wilfully necessarily implies that it is done with knowledge. It is impossible to lay down any exhaustive rule as to what overt acts would constitute the offence or as to what quantum of evidence would be sufficient to give rise to the inference of knowledge and I do not propose to attempt to do so here.

The truth is that in the present case there is not a scintilla of evidence that the women who were found working in the Fook Heng Rubber Works Factory at 10.10 p.m. on 31st December were employed by the present appellant or that he had any knowledge that they were working at the time in question or that he was in any way responsible for their working at that time. It is possible that very little evidence would have been necessary to give rise to some such inference. But there was no evidence. The factory was said to be the defendant's but beyond that there was nothing. The Labour Code contains a very comprehensive definition of "employer" but there was nothing to shew that the women had any contract of employment with the defendant or with any other person whose agent or manager he was. There was nothing to shew that he did have or could have had or should have had any knowledge that they were working. In the circumstances, it was impossible to say that there was any causal connection between the fact that they were working and anything he had said or done. In the circumstances the conviction cannot stand.

The appeal is allowed. The conviction is quashed and an order made of acquittal and discharge. The fine, if paid, will be refunded.

Appeal allowed.

Solicitor for the appellant: *Chin Swee On.*

PUBLIC PROSECUTOR v. LIM PENG SENG

[A. Cr. J. (Thomson J.) July 22, 1955]

[Ipoh — Juvenile Appeal No. 50 of 1955]

Common Gaming Houses Ordinance 1953, s. 4(1)(c) — Assisting in the carrying on of a public lottery — Charge — Whether prosecuting officer can himself give expert evidence.

In this case the respondent was charged before the Juvenile Court at Sitiawan as follows: "That you on 16.4.55 at about 8.30 a.m. at Telok Muroh, Lumut, in the District of Dindings were found in possession of 40 lottery tickets relating to a public lottery to wit "100, 1,000 and 10,000 characters lottery" thereby did assist in the carrying on the said public lottery and that you have thereby committed an offence punishable under s. 4(1)(c) Ordinance 26/53."

The facts shortly were that the respondent was found together with his father in the hall of premises which were raided by the police. The evidence showed that the respondent was sitting at a table with a pen containing red ink. In front of him were found a pen with blue ink and two small booklets. The pages of the booklets were alleged to be lottery tickets. No evidence was given of what the father was doing. At the trial the prosecuting officer stated that he himself proposed to give expert evidence as to the nature of the booklets. The learned President without deciding whether or not he would allow the prosecuting officer to give such evidence held that possession of the booklets had not been made out against the respondent and therefore acquitted him. Against this decision the Public Prosecutor appealed.

Held: (1) although the respondent was not in possession of the booklets there might well have been evidence which would have given rise to the inference that he was assisting his father to carry on a public lottery by doing something in relation to the booklets; (2) the learned President was wrong in coming to a decision before he decided whether he would allow the prosecuting officer to give expert evidence or not; (3) in the circumstances the order of acquittal must be set aside and a retrial ordered.

MAGISTRATE'S CRIMINAL APPEAL.

A. P. Jack (Federal Counsel) for the appellant.

A. S. Yeo for the respondent.

Cur. Adv. Vult.

Thomson J.: — This is an appeal by the Public Prosecutor against a decision of the Juvenile Court at Sitiawan presided over by the Sessions Court President. I do not think that there has been any substantial miscarriage of justice for, quite frankly, I do not think the respondent who is a boy of 12 years should have been prosecuted at all. The case, however, was a peculiar one and by reason of its circumtances I feel compelled to take a certain course.

On 16th April, 1955, Police Officers entered a dwelling house at Telok Muroh and in the hall of the premises they found the respondent's father and the respondent. What the father was doing is not in evidence but the son was sitting at a table with a pen containing red ink. In front of him were found a pen with blue ink and two small booklets. The pages of the booklets were suspected of being lottery tickets although personally from my own not inconsiderable knowledge of this subject I should have said they were records of stakes in a lottery though they might have been duplicates of tickets.

On this it was decided, no doubt quite properly, to prosecute the father and I understand, though I do not think this was brought to the attention of the Juvenile Court, that some sort of proceedings against him are pending. It was also decided to prosecute the son. In view of his tender years and in view of the fact that whatever he was doing he was doing it with the knowledge and presumably with the consent, if not, indeed, under the influence of his father, I fail to see why such a prosecution was considered necessary, and if it was considered necessary I find it even more difficult to think of reasons why he should not have been tried at the same time as his father.

Be that as it may, he was prosecuted alone and appeared before the Juvenile Court at Sitiawan on the following charge:—

"That you on 16.4.55 at about 8.30 a.m. at Telok Muroh, Lumut, in the District of Dindings were found in possession of 40 lottery tickets relating to a public lottery to wit "100, 1,000 and 10,000 characters lottery" thereby did assist in the carrying on the said public lottery and that you have thereby committed an offence punishable under s. 4(1)(c) Ordinance 26/53."

Now, I do not say that that charge was so bad as to be incapable of cure by amendment but as it stands it is open to the very gravest objection. The possession of lottery tickets is not an offence. What is an offence is assisting in the carrying on of a public lottery. It is true that by reason of section 11 of the Common Gaming Houses Ordinance a person who is "found in possession of ten or more lottery.....or duplicates of lottery tickets or of any.....record of stakes .....relating to a lottery" is to be presumed until the contrary is proved to be assisting in a public lottery then in progress. That, however, is merely a rebuttable presumption created by the law and does not make possession of tickets in itself an offence. The point should be too clear for argument. There are many instances in which a person is in possession of lottery tickets where there can be no question of any offence. For example, I have no doubt that the Registrar of this Court is in possession of large numbers of such tickets not, I hasten to add, in his private capacity but as the functionary in possession for the time being of exhibits which come before the Court.

To import as was done here a statutory presumption into the definition of an offence may or may not be fatal to the charge but as I have said it is open to very grave objection. And the reason for the objection is that it is calculated to lead and in the present case has led to very grave confusion as to the real issues to be decided.

I will elaborate this last point shortly but before doing so I must return to the proceedings in the Juvenile Court. There the Prosecution was conducted by a Police Inspector and the accused was not represented. Two Police Officers gave evidence of the facts relating to their visit to the house at Telok Muroh which have already been set out and produced the pens and the booklets which they found. The Prosecuting Officer then stated that he himself proposed to give expert evidence as to the nature of the booklets. The learned President thereupon expressed the view, with which I am in entire agreement, that it was most undesirable for the Prosecuting Officer to give such evidence. There was some discussion on the point in the course of which the Prosecuting Officer mentioned the difficulties which face the Police in outlying areas in such circumstances and in the event the learned President without deciding whether or not he would allow the evidence to be given "decided to consider the essential point in the case at this stage, namely, whether possession had been proven, so as to bring the presumption under section 11 of the Ordinance into play." He then reviewed the evidence and came to the conclusion, with which so far as it goes I see no cause to quarrel that possession of the booklets had not been made out against the accused. On that he dismissed the charge and made an order of acquittal and discharge.

In thus dealing with the matter I think the learned President made two errors. In the first place, I think he was wrong in disposing of the charge before he had decided what course to take regarding the expert evidence tendered on behalf of the Prosecution. He could have allowed the Prosecuting Officer to give evidence or he could have refused to allow him to give evidence with or without granting an adjournment for another expert witness to be obtained. But he should have dealt with the point in one way or another. In the second place, in my opinion, he failed to appreciate the real issue which he had to decide.

I will deal with the second of these points first.

The real question in the case was whether the accused was assisting in carrying on a public lottery.

It was not whether the relationship in which he was found to the booklets amounted to possession. If he was in possession of the booklets and if the booklets were a record of stakes then the presumption contained in section 11 of the Ordinance arose and the onus was placed upon the accused of rebutting it. If possession was not made out, and I do not think it was, the presumption did not arise but the question remained to be considered whether irrespective of possession what the accused was doing amounted to assisting in carrying on a lottery. After all, it is quite possible to do acts in relation to things without giving rise to an inference of *animus possidendi*. For example, if I am found with a pen in my hand in front of the Visitor's Book at King's House a very strong inference arises that I am about to pay my respects to Her Majesty's Representative by inscribing my name. On the other hand there can be no question of my evincing any *animus possidendi* in relation to the book. In the present case, although the accused was not in possession of the booklets, there well might have been evidence which would have given rise to the inference that he was assisting his father to carry on a lottery by doing something in relation to them.

On the evidence to which the learned President actually listened there could be no such inference but when he decided the case on that evidence he had not yet decided whether he would allow further evidence to be given on behalf of the Prosecution.

And that brings me to the first point in respect of which I think he erred. If he had refused to allow the Prosecuting Officer to give evidence and if he had refused to allow an adjournment to enable another expert to be called that, of course, would have been the end of the matter. But if expert evidence as to the nature of the booklets had been given and if the booklets had then been themselves examined in the light of that evidence it may be, I do not say it would be so, but it may be that an entirely different complexion would have been put upon the matter. The learned President would seem to have been greatly impre sed by the consideration that if a small boy finds himself in immediate juxtaposition with a pen and with a piece of paper then by reason of sheer juvenile playfulness he may be tempted to take up the pen and to write upon the paper. That may be true. If, on the other hand, a small boy, and the respondent is not so very small, is found with a pen in his hand and sitting in front of his father's ledger or cheque book and his father is present I should have thought that very different considerations applied. I am not placing the slightest weight on the observation I made at the hearing of the appeal that it seems rather absurd to think that a Chinese boy of 12 living in Perak does not know a great deal about the 100 characters lottery, though it does seem as absurd as to think that a Scots boy of the same age living in the Gorbals of Glasgow does not know a great deal about the activities of street bookmakers. The point is that if the learned President had had the documents explained to him he might well have come to a different conclusion and that he ought not to have come to any conclusion before he had decided whether he would allow them to be explained to him.

In the circumstances, I do not think the order of acquittal and discharge can stand and I am setting it aside. I think I am bound to make an order for re-trial but I would point out that such an order is no bar to the prosecution being withdrawn.

Re-trial ordered.

KALIMUTHU v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) August 5, 1955]

[Ipoh — Criminal Appeal No. 55 of 1955]

Excise Enactment (Cap. 133) — Excise Rules, 1923, r. 101A — Possession of toddy to which there has been added water — Conduct of prosecution by prosecution witness.

This was an appeal against the conviction of the appellant on a charge of possession of toddy to which water has been added. The appellant was the holder of an Excise Licence for the sale of toddy by wholesale. The evidence was that at about 5.20 p.m. on March 14, 1955, officials of the Customs Department, one of whom conducted the prosecution at the trial, visited a retail shop for the sale of toddy. This shop obtained its wholesale supplies from the accused. The shop was closed but on entering it two pint bottles were found contained in a movable box which was closed and sealed with a seal bearing the initials "V.K." which are the initials of the accused. A portion of the toddy in the two pint bottles was removed and on analysis was subsequently found to contain not less than 9% of added water. On these facts, the learned Magistrate convicted the appellant.

Held: there was no evidence to show that the toddy found was in the possession of the appellant and therefore the conviction must be set aside.

Semble: although it is not expressly forbidden by any law to have the prosecution conducted by a person who is also a prosecution witness, this is a course which is open to the very gravest objection.

MAGISTRATE'S CRIMINAL APPEAL.

A. S. Yeo for the appellant.

A. P. Jack (Federal Counsel) for the respondent.

Thomson J. : — The accused in this case appeared before the Magistrate at Tapah on the following charge :—

"That you V. Kalimuthu on 14.3.55 at about 5.30 p.m. at Narborough Estate Toddy Shop, Tapah, being a holder